In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 197

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CROMPTON-HIGHLAND MILLS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

I. THE EMPLOYER'S CONTENTION THAT THE UNION DID NOT REQUEST TO BARGAIN UPON THE UNILATERALLY DETERMINED WAGE INCREASE IS WITHOUT MERIT

To condone its unilateral grant of a wage increase without antecedent bargaining upon it with the Union, the employer relies principally upon the absence of a request by the Union to bargain with respect to this specific increase, a unilaterally-determined action unknown to the Union until the employer put it into effect (Br., pp. 31–43). In essence, the employer contends that the Union must anticipate any change in terms and conditions of employment the employer

822186—49

may decide to make before the employer can be held responsible for failure to bargain with the Union prior to effectuating the change. To support this position, the employer misreads the meaning of *National Labor Relations Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 297–298, and *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, 343–344 (Br., pp. 32–33).

In our main brief (p. 34, n. 22) we have shown that the principle of these cases is inapplicable to the present situation. In both the *Columbian* and the *Sands* cases a stalemate in negotiations had been reached. In the *Columbian* case, the employer thereafter resumed operation of its struck plant (305 U. S. at 295); in *Sands*, after the failure of negotiations and the lawful discharge of the employees for failing to abide by their contract, the employer resumed the operation of its closed plant in accordance with an agreement reached with a new bargaining representative designated by a majority of the new employees (306 U. S. at 338–339, 344). *In neither case did the employer undertake to change the status quo by any unilateral action different from that which it proposed and which was fully explored without success during the negotiations.*

In a situation such as was involved in the *Columbian* and *Sands* cases, if the union desires to bargain, the union must request a resumption

of negotiations, because in such a situation, it is the union, not the employer, which seeks a change in the *status quo* as reflected in a stalemated negotiation. But where, as here, it is the employer which seeks a change in the *status quo* by changing its position, it is the employer which is required to reinstitute bargaining.

In short, whether the employer or the union is required to present a request to bargain to the other side depends upon which of the two is initiating changes in employment terms. To insist that the initiative always devolves upon the union, even where it is the employer which changes its stand, is to require the union to exercise prophetic divination as to the employer's unstated position as a condition of participation in collective bargaining.

II. THE EMPLOYER'S ALLEGATIONS AS TO FACTS ARISING AFTER THE HEARING DO NOT AFFECT THE PROPRIETY OF ENFORCING THE BOARD'S ORDER

The employer alleges the existence of a state of facts arising after the close of the hearing before the trial examiner which are asserted to affect the propriety of enforcing the Board's order at the present time (Br., pp. 43–52). The allegations reduce themselves to an assertion that negotiations between the Union and the employer, held after the hearing, were unsuccessful because of the presumed unreasonableness of the Union's bargaining positions. The employer concludes that the Union "so completely frustrated [the

employer's] repeated and earnest efforts to bargain with the Union that [the employer] should not now be ordered to bargain with the Union." (Br., p. 44).

The circumstances alleged are wholly immaterial to the propriety of enforcing the Board's order. The unreasonableness which the employer imputes to the Union rests upon the employer's belief that the Union placed too much emphasis upon union security during the negotiations. But that factor is no more relevant to the negotiations which were carried on after the hearing than it was to the negotiations carried on before the hearing. Whatever the Union's emphasis upon its security, it does not give the employer *carte blanche* to refuse to treat with it, which the employer in effect requests (See the Board's main brief, pp. 37–39). It could as well be said that the employer's "adamant" (B. A. 73) position against any form of union security was unreasonable.

It is not the function of the employer to monitor "the services of the union, whether good or bad,"[1] and so long as a majority of the employees desire representation by the Union, it is incumbent upon the employer to continue to recognize it. In short, the employer's duty to bargain does not turn on its appraisal of the worth of the Union, but upon the will of the em-

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[1] *National Labor Relations Board* v. *Acme Air Appliance Company, Inc.*, 117 F. 2d 417, 420 (C. C. A. 2).

ployees who have ample means of changing or abandoning union representation should they be dissatisfied with it.[2] The employer's contention is no different in substance from that rejected by this Court in *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 344. In rejecting a contention that the strikers' continuing employee status during a strike depended on the reasonableness of the strike, this Court stated:

> That there were pending negotiations for the execution of a contract touching wages, and terms and conditions of employment of point-to-point operators cannot be denied. But it is said the record fails to disclose what caused these negotiations to fail so as to show that the [employer] was in any wise in fault in failing to comply with the union's demands; and, therefore, for all that appears, the strike was not called by reason of the fault of the [employer]. * * * The wisdom, or unwisdom, of the men, their justification, or lack of it, in attributing to [the employer] an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

[2] It may be noted that when the employees voted to strike by a large majority, union security was one of the issues submitted to them (B. A. 38–39). Moreover, no contract negotiated by the Union is binding upon the employees until they vote to accept it (Board's main brief, p. 4, n. 2).

Just as the employee status of strikers does not turn on the wisdom or unwisdom of their action, so too, the representative status of the Union does not turn on the wisdom or unwisdom of their bargaining positions in negotiations. Although negotiation with the Union never results in a contract, so long as the Union remains the bargaining representative of its employees, the employer remains under a duty to bargain collectively. Since the only allegedly changed circumstance alleged by the employer is the continued failure to reach a contract, there is no need for a remand to take these facts, and contrary to the employer's statement (Br., pp. 27, 29, 51), the Board has never sought a remand.

III. THE BOARD'S ORDER IS NOT TOO BROAD IN SCOPE

The Board's order requires the employer to cease and desist from refusing to bargain with the Union "by taking action without prior consultation with said organization, with respect to rates of pay, wages, hours of employment, and other conditions of employment" and "in any other manner interfering with the efforts of" the Union to bargain; and, upon request, to bargain with the Union (R. 63). The employer contends "that the order of the Board, if it is to be enforced, should be restricted to the making of general increases in wage rates without consulting the Union" (Br., p. 61). Thus, the employer would restrict the order against it to the

precise form which its infraction took, namely, the unilateral grant of a wage raise. In order to sustain this contention the employer needs not only to upset the Board's alternative finding that the employer "was not acting in good faith during the negotiations" (Board's main brief, pp. 14, 42–44), but also to show that its unilateral action with respect to wages gives no reason to anticipate that it may also take unilateral action with respect to other subjects of collective bargaining.

The Board's order is geared entirely to the employer's breach of its collective bargaining obligation, and is no more onerous in substance than those approved by this Court in *National Labor Relations* v. *Express Publishing Co.*, 312 U. S. 426, 430, 439, and in *May Department Stores Company* v. *National Labor Relations Board*, 326 U. S. 376, 386–393. In *May Department Stores*, where the unfair labor practice involved a "refusal to bargain" and a unilateral "salary increase," "intertwined" with the judicial test of a "unit asserted to be certified improperly," this Court sanctioned an order enjoining the employer, not only from refusing to bargain, but also from engaging in "any other acts in any manner interfering with the representative's efforts to negotiate for or represent the above named employees as bargaining agent." (326 U. S. at 376, 388.) As stated in the *Express* case, "To justify an order restraining other

violations, in addition to the precise infraction found, "it must appear that they bear some resemblance to that which the employer has committed or," distinctively, "that danger of their commission in the future is to be anticipated from the course of his conduct in the past" (312 U. S. at 437). See also, *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 51–52. Where, as here, the unilateral grant of a wage increase was found to be a violation, the restraint of unilateral action with respect to other subjects of collective bargaining at the least does "bear some resemblance" to the violation found, and alternatively, the "danger" of employer recourse to unilateral action on other subjects "in the future" may "be anticipated" from the known recourse to unilateral action on wages "in the past." Indeed, the employer in this case does not suggest that its purported right to unilateral action, in the circumstances in which it was exercised, is limited to wages alone. Plainly, where "a clear violation of law" is disclosed, "it is not necessary that all of the untravelled roads to that end be left open and that only the worn one be closed." *International Salt Co.* v. *United States*, 332 U. S. 392, 400.

Nor can the employer defeat the scope of the order, as it seeks to do (Br., pp. 39–61), by conjuring hypothetical hardship to it in the application of the order to unmaterialized facts and imaginary situations. It can hardly be assumed

that the Board will construe the order in a concrete case in disregard of its own earlier decision or of the industrial realities of plant operation. The Board's order in this case steers a proper course between the rock of excessive specificity, which invites evasion of purpose, and the whirlpool of entrapping indefiniteness, which fails to afford any guide to conduct. Compare *International Salt Co.* v. *United States*, 332 U. S. 392, 400–402, with *J. I. Case Company* v. *National Labor Relations Board*, 321 U. S. 332, 341.

Respectfully submitted.

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